Supreme Court, U.S.
FILED

JUL 12 2010

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No. 10-87

In the

Supreme Court of the United States

ROBERT M. MARDIROSIAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the unrepudiated bill of sale granted by the owner barred a criminal prosecution of the transferee for possession of stolen property under 18 U.S.C. § 2315.

2. Whether the district court's ruling, as a matter of law, that the defendant's title to the property was invalid and its refusal to submit to the jury the questions (i) whether the property remained "stolen" after he received a bill of sale from the owner and (ii) whether he subjectively believed he held title deprived him of his Fifth and Sixth Amendment rights to a jury determination of elements of the offense.

3. Whether, in determining the adjusted offense level under U.S.S.G. §2B1.1, the value of property that had been voluntarily returned to the owner long before the defendant's identity and offense were discovered should have been credited against the total loss.

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Robert M. Mardirosian respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

OPINION BELOW

The decision of the court of appeals is reported at 602 F.3d 1 and is reproduced in the Appendix at 1a - 27a. The district court did not issue memoranda of its decisions.

JURISDICTION

The judgment of the court of appeals was issued on April 14, 2010. Pet. App. 1a. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1). The district court had jurisdiction pursuant to 18 U.S.C. § 3231, and the court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291.

CONSTITUTIONAL, STATUTORY AND GUIDELINE PROVISIONS INVOLVED

The Fifth Amendment to the U.S. Constitution provides, in part:

> No person shall be. . . deprived of life, liberty, or property, without due process of law; . . .

The Sixth Amendment to the U.S. Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed,

which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Title 18, United States Code, sec. 2315 provides:

Whoever receives, possesses, conceals, stores, barters, sells, or disposes of any goods, wares, or merchandise, securities, or money of the value of $5,000 or more, . . . which have crossed a State or United States boundary after being stolen, unlawfully converted, or taken, knowing the same to have been stolen, unlawfully converted, or taken; . . . Shall be fined under this title or imprisoned not more than ten years, or both.

Application note 3(E) to U.S.S.G. § 2B1.1 provides:

Credits Against Loss. – Loss shall be reduced by the following:

(i) The money returned, and the fair market value of the property returned and the services rendered, by the defendant or other persons acting jointly with the defendant, to the victim before the offense was detected. The time of detection of the offense is the earlier of (I) the time the offense was discovered by a victim or government agency; or (II) the time the defendant knew or reasonably should have

known that the offense was detected or about to be detected by a victim or government agency.

Other pertinent authorities, included in the Appendix hereto, are:

Restatement (Second), Conflict of Laws 2d, § 187 (rev. 1989);

Restatement (Second), Contracts 2d, §§ 174, 175, 176 and Illustration 1 to sec. 176 (1981);

Swiss Code of Obligations, Contract Law, Art. 29 - 31.

STATEMENT OF THE CASE

In 1978, seven paintings were stolen from the home of Michael Bakwin in the Berkshires. Among them was Cézanne's still life *Bouilloire et Fruits*. The remaining six paintings were lesser works by less well-known Impressionist artists. The paintings were left on defendant Robert Mardirosian's premises by David Colvin, a client whom Mardirosian, a criminal defense lawyer, was representing in a federal investigation in Boston. Colvin was murdered nine months after the theft. About a year later, the defendant discovered the paintings in an attic where he had allowed Colvin to stay the night before a court appearance. In or about 1988, the defendant moved the paintings to Switzerland.

In 1999, Mardirosian, through a nominee corporation and a Swiss attorney, attempted to negotiate the return of all the paintings for a cash reward. In October 1999, Bakwin ultimately agreed,

not to pay a cash reward, but to give a bill of sale to the six lesser paintings in exchange for the return of the vastly more valuable Cézanne. The parties entered into a written agreement on October 25, 1999, pursuant to which the defendant signed a truthful declaration that he had nothing to do with the theft. The declaration, which was sealed and placed in escrow, disclosed his identity as principal of the nominee corporation. The written agreement recites that it is subject to Swiss law. Pursuant to the agreement, the Cézanne still life was returned to Bakwin's agent in the offices of his attorney in Geneva.

More than three weeks later, in London, Bakwin's agent executed a bill of sale to the remaining six paintings to Mardirosian's nominee and delivered it to Mardirosian's Swiss attorney. After the meeting, Bakwin's agent delivered the sealed declaration to Herbert Smith, a London law firm which acted as the parties' escrow agent and removed the six paintings from the Art Loss Register's registry of stolen works.[1] Mardirosian's identity was to remain secret unless and until Bakwin obtained a court order to release the declaration from escrow.

Almost immediately, Bakwin sold the Cézanne at auction for approximately $29.3 million. The value of the remaining six paintings to which the defendant was given a bill of sale was in the vicinity of $1 million – less than 4% of the value of the Cézanne. Bakwin took no action from 1999 to 2005 to invalidate the

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[1] The Art Loss Register is a for-profit organization whose founder and majority stockholder Julian Radcliffe acted as Bakwin's agent in negotiating the return of the Cézanne.

Swiss agreement or the bill of sale his agent had executed on his behalf. Nor did he seek to obtain the release of the sealed declaration from escrow in order to discover the identity of the holder.

In 2005, more than five years after the transfer of title, the defendant made plans to sell four of the paintings at auction in London, and toward that end, in April 2005, arranged for the transport of the paintings from Geneva to London. Only after the paintings were in London, one month before the June auction, did Bakwin's agent claim that the bill of sale had been executed under duress. Bakwin brought court proceedings to stop the auction and to unseal the escrowed declaration.

On March 8, 2007, a federal grand jury in the District of Massachusetts indicted the defendant on two counts. Count One alleged that the defendant possessed stolen property, to wit, the six paintings, in violation of 18 U.S.C. § 2315.[2] Count Two alleged that the transfer of the paintings from Geneva to London violated 18 U.S.C. § 2314.

A jury trial was held in August 2008, at the conclusion of which the court dismissed Count Two for failure to state an offense. Defendant moved for judgment of acquittal on Count One, which was denied after closing arguments.

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[2] The First Circuit's opinion states that the defendant was charged with criminal possession of the Cézanne (P. App. 2a), but, in fact, the indictment did not include possession of the Cézanne, which clearly fell outside the statute of limitations.

The defendant sought a jury instruction that the government must prove that the property remained "stolen" at the time of the offense, that is, between March 8, 2002, and April 11, 2005, and that the jury should determine the validity of the 1999 agreement under Swiss law. He also sought an instruction that the government must prove that the defendant subjectively knew that the paintings in his possession were still stolen property during the relevant period. Both requests were denied. Instead, the district court instructed the jury that the 1999 agreement was "illegal" and did not provide the defendant with a defense. The court instructed that it was of no moment whether the owner entered the contract voluntarily or under duress, and the jury was not to consider the issue – even though the terms of the contract had been fully performed by both parties. As to the element of knowledge, the court instructed the jury that it need only find that the defendant knew that the property had been stolen in or about 1978, and that it did not matter if the defendant believed he owned the property during the period of the offense.

On August 18, 2008, the jury returned a verdict of guilty on Count One. The defendant was sentenced on December 15, 2008, to an 84-month term of imprisonment, a three-year term of supervised release, a $100,000 fine, and return of the six paintings. In determining the guideline range under U.S.S.G. §2B1.1, the district court included the 1999 value of the Cézanne, $29.3 million, along with the value of the six paintings in the defendant's possession to reach a total of $30.2 million. The defendant contended that the value of the Cézanne should have been credited against the total loss pursuant to §2B1.1, application n. 3(E), because the Cézanne had been returned long

before the victim or law enforcement knew either the possessor's identity or that the possessor had committed any offense. The district court disagreed, ruling that the "offense" was known in 1978 and that return of any painting after the owner became aware of the theft did not qualify for the credit. Accordingly, the court enhanced the base offense level 22 levels for loss, rather than the 14 levels applicable to a loss between $400,000 and $1 million. U.S.S.G. §2B1.1(b)(1)(H). The guideline range was determined, based on an adjusted offense level of 32 and criminal history category I, to be 121 to 151 months, which exceeded the ten-year maximum penalty.

On appeal, the First Circuit ruled that the 1999 agreement and bill of sale were void *ab initio* as a contract undertaken for an illegal purpose and therefore "had no bearing on the 'stolen' character of the paintings or on whether Mardirosian possessed the requisite mens rea to be convicted under 18 U.S.C. § 2315." Pet. App. 16a.[3] The court upheld the district court's refusal to submit either issue to the jury and deemed the evidence sufficient to support the verdict. With respect to the defendant's sentencing claim, the court ruled that the credit against loss is available only if the property is returned before either the victim or law enforcement becomes aware of the crime, even if the identity of the perpetrator remains unknown. The court endorsed the district court's view that the offense was detected in 1978 when Bakwin discovered

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[3] In so ruling, the court failed to apply Swiss law which governs the contract under American conflict-of-laws principles and by its terms. Restatement (Second), Conflict of Laws 2d, § 187 (rev. 1989); Pet. App. 40a.

that his paintings were stolen, and not in 2005 when the escrowed declaration was opened and both law enforcement and the previous owner learned that Mardirosian held the paintings. The court also agreed that the Cézanne's value in 1999 rather than 1978 was the appropriate measure of loss. Pet. App. 24a.

REASONS FOR GRANTING THE WRIT

I. The Decision that Transfer of Title by an Owner to the Possessor of Stolen Property Is Void *Ab Initio* so as to Render Possession after the Transfer of Title a Crime Is So Far Contrary to Precedent and the Usual Course of Judicial Proceedings as to Warrant the Exercise of this Court's Supervisory Power.

This case pits long-established and internationally recognized principles governing the validity of contracts with defects in formation against the federal statute making criminal the knowing possession of stolen property. Contrary to well-settled principles of contract, prevailing nationwide and abroad, the lower courts in this case ruled that an owner of property that had been stolen may not validly transfer title to a small portion of that property to a possessor who seeks a reward for its return. The court's holding subjects the transferee to criminal prosecution for possession of "stolen" property long after the statute of limitations expired on both the pre-transfer possession and the transaction transferring title – without regard to whether the transfer was procured by duress or was entirely voluntary.

In ruling the bill of sale void, the court ignored well-settled law in both the United States and in

Switzerland, where the 1999 contract was made and executed, that a defect in the formation of contracts renders a contract merely voidable and not void *ab initio*. *See* Restatement (Second), Contracts 2d § 175 (1981); Swiss Code of Obligations, Contract Law, art. 29-31. In order to invalidate a contract, one party to it must take timely action and must demonstrate that the contract was entered into under circumstances which render the contract voidable, such as extortion or duress.

In 2007 when this prosecution was commenced, Bakwin was time-barred from seeking to invalidate the transfer under both Swiss law and Massachusetts law. Under art. 31 of the Swiss Code of Obligations, which governs the contract at issue, a party whose consent was subject to error, deception, or duress has one year in which to declare the contract void. If he does not do so, the contact is deemed ratified. Pet. App. 44a. Domestic law is not materially different. *See Happ v. Corning*, 466 F.3d 41, 44 (1st Cir. 2006)(applying Massachusetts law); *Cabot Corp. v. AVX Corp.*, 448 Mass. 629, 643-44, 863 N.E.2d 503, 515-16 (2007) (contract not voidable for economic duress where defendant accepted benefits under the contract and did not claim duress until 18 months later). Since Bakwin took no steps to invalidate the contract within the period allowed under Swiss law, or indeed, even within the five-year statute of limitations applicable to a criminal charge of possession under federal law,[4] Mardirosian held valid title and could not be prosecuted for criminal possession.

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[4] 18 U.S.C. § 3282(a)

In ruling that the transfer of title was illegal and against public policy, the First Circuit misinterpreted this Court's decision in *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72 (1982), in which the Court held that a coal producer sued on a contract to make contributions to union health and retirement funds on the basis of "purchased coal" could raise illegality of the contract as a defense. The First Circuit also relied on other civil cases that hold that contracts for an illegal purpose are void *ab initio* and are therefore not enforceable. *See McMullen v. Hoffman*, 174 U.S. 639 (1899)(secret agreement between bidders on a public contract is illegal and unenforceable); *Kiely v. Raytheon Co.*, 105 F.3d 734, 736 (1st Cir. 1997)(an agreement to achieve mutual benefit from the parties' cooperative violation of the law is void and unenforceable as against public policy); *cf. Mass. Municipal Wholesale Elec. Co. v. Town of Danvers*, 411 Mass. 39, 55, 577 N.E.2d 283, 293 (1991)("The consequences of voiding a contract ab initio for illegality, however, must be linked to the considerations of fairness and public policy."). *See also Continental Wall Paper Co. v. Louis Voight & Sons Co.*, 212 U.S. 227 (1909)(illegal contract of combination in violation of anti-trust laws is unenforceable). All such cases arose in the context of civil actions to enforce the obligations of a party to the contract; they did not arise in the context of a criminal prosecution predicated on disregarding the parties' completed performance of their agreement.

The First Circuit failed to distinguish between contracts the performance of which is illegal and contracts with a defect in formation. Even if it was unlawful for the defendant to seek a reward for returning the Cézanne, it was not illegal for the owner

to give a reward. The only issues with respect to the enforceability of such a contract are whether the reward was given under duress or some other infirmity in the formation of the contract, and whether the owner sought rescission in a timely fashion.

There is no public policy against an owner giving a reward for the return of stolen property. *See, e.g. Hall v. Schoenwetter*, 239 Conn. 553, 686 A.2d 980 (1996), where the Connecticut Supreme Court resolved a dispute over a reward paid for the return of a stolen Stradivarius. The Court ruled that even if the decedent had stolen the violin, his estate was entitled to the reward, rather than the executrix who had negotiated the reward in exchange for returning the violin. The reasoning of the First Circuit is in direct conflict with the Connecticut Supreme Court's holding. Under the First Circuit's rationale and holding, neither party would be entitled to the reward, the payment of which would be illegal as contrary to public policy.

This is the only case of which petitioner is aware where a court has held that even a voluntary transfer of title to property by the owner of that property is void *ab initio*.[5] It is the only case in which a transfer was first declared illegal in a criminal proceeding, thereby depriving the defendant of the defense that he possessed the property under color of title before the title was declared void. The defendant is aware of no

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[5] The jury was not permitted to consider whether the contract was procured voluntarily or under duress. There was compelling evidence that the deal was negotiated at arm's length and was not coerced, in particular, the fact that the bill of sale was executed over three weeks after the Cézanne was returned.

other case in which a defendant has been convicted for possession of stolen property where he held undisturbed title to the property in his possession, and where there was no prior judicial determination that the transfer of title was invalid on the grounds of duress or otherwise. The procedure the First Circuit upheld in this case is so far contrary to precedent and principle as to call for an exercise of this Court's supervisory power.

II. The First Circuit's Holding that Neither the "Stolen" Character of the Property nor Defendant's post-2002 Mens Rea Were Jury Questions Is in Conflict with This Court's Decision in *Morissette* and with the Second Circuit's Decision in *Schultz* and Deprived the Defendant of Due Process and his Right to Trial by Jury.

Defendant requested and was refused a jury instruction as to whether the bill of sale executed in 1999 gave him title to the paintings in his possession so that they were no longer "stolen" during the relevant period. He also requested and was refused a jury instruction that if he believed that he held title to the paintings, then he could not be found guilty even if he were mistaken about title. The court's rulings as a matter of law that the defendant's color-of-title defense was invalid and that, with respect to mens rea, the government needed to prove only that the defendant knew that the paintings had been stolen at some time, deprived him of his rights to due process and to a jury determination of all elements of his offense as guaranteed by the Fifth and Sixth Amendments. Those provisions of the constitution require that every element of the crime be determined

by a jury. *United States v. Gaudin*, 515 U.S. 506, 522-23 (1995).

This Court should grant the petition because the First Circuit has decided an important federal question in a way that conflicts with relevant, analogous decisions of this Court. The First Circuit's decision upholding the district court's refusal to submit the questions whether the property was still "stolen" after the 1999 transfer and whether the defendant subjectively believed, from 2002 to 2007, that he held title to the property contravenes this Court's holding in *Morissette v. United States*, 342 U.S. 246 (1952), and disregards the analogous holding and reasoning of *Liparota v. United States*, 471 U.S. 419 (1985). It also is in direct conflict with the Second Circuit's decision in *United States v. Schultz*, 333 F.3d 393 (2d Cir. 2003).

In *Morissette*, the defendant had been convicted of conversion in violation of 18 U.S.C.§ 641 as a result of removing spent bomb casings from government-owned land. The Court held that the question whether the defendant subjectively believed that the casings were abandoned presents a jury question, and that intent to convert may not be presumed from the intentional taking of the property. 342 U.S. at 274-75. In *Liparota v. United States*, the Court considered whether the government was required to prove that the defendant intended to commit food stamp fraud. In ruling that the rule of lenity required the government to prove specific intent, the Court analogized to stolen-property cases, explaining that, while ignorance that receipt of stolen goods is illegal is not a defense, ignorance of the legal status of the goods as stolen is a mistake of fact.

> It is not a defense to a charge of receipt of stolen goods that one did not know that such receipt was illegal, and it is not a defense to a charge of a [7 U.S.C.] § 2024(b)(1) violation that one did not know that possessing food stamps in a manner unauthorized by statute or regulations was illegal. It is, however, a defense to a charge of knowing receipt of stolen goods that one did not know that the goods were stolen, just as it is a defense to a charge of a § 2024(b)(1) violation that one did not know that one's possession was unauthorized.

471 U.S. at 426 n.9.

The First Circuit did not even cite, much less distinguish, *Morissette* or *Liparota*. Instead, the court cited *Barlow v. United States*, 32 U.S. 404, 411 (1833), which is not a mistake-of-fact case, but rather stands for the proposition that a mistake of law is no defense. Mistake of law is not at issue here; rather, the fact question for the jury was whether the defendant knew that his title to the goods was invalid before any authority had declared it to be invalid.

In *Schultz*, which the First Circuit erroneously distinguished, the Second Circuit held that, while the defendant was entitled to defend a National Stolen Property Act case on the ground that he did not know that Egyptian patrimony law rendered the goods he attempted to smuggle "stolen", he could not avoid criminal responsibility on the ground that he did not understand that the NSPA would apply to such goods.

> A defendant charged with violating the NSPA may argue that he did not know a certain fact

> that made his conduct criminal, that is, that he did not know the objects in question were stolen. Schultz's "mistake of Egyptian law" defense goes to that issue. However, if a jury finds that a defendant knew all of the relevant facts, the defendant cannot then escape liability by contending that he did not know the law.

333 F.3d at 411. The First Circuit distinguished this holding on the ground that the mistake-of-fact defense applies only if the defendant is wholly innocent, "not morally culpable." Pet. App. 14a. The First Circuit panel reasoned:

> In *Schultz* – as in other mistake-of-fact cases – the defendant argued that his conduct was at all times innocent and that he never possessed the requisite mens rea to be guilty of the charged crime.

Pet. App. 13a. In fact, the defendant in *Schultz* did not make such an argument and the Second Circuit's decision does not turn on a distinction between mistakes that are "wholly innocent" and those that are not. To the contrary, the Second Circuit noted in some detail that Schultz's conduct was *not* innocent: he had conspired to smuggle the goods from Egypt, he was engaged in a scheme to defraud potential buyers, he and his co-conspirators had spoken in code and expressly contemplated that they might be imprisoned, etc. In short, *Schultz* hardly stands for the proposition that a defendant who seeks to assert a mistake-of-fact defense and a jury determination of his mens rea must be wholly innocent of wrongdoing. Quite to the contrary, Schultz was permitted to raise the very defense that Mardirosian was not permitted to raise:

that he did not believe the goods in his possession were stolen. Thus, the cases are in direct conflict.

Not only did the First Circuit misread *Schultz*, but its notion that a defendant is entitled to a mistake-of-fact defense and to trial by jury on the issue of mens rea if and only if "his conduct was at all times innocent" is unprecedented. None of the cases the First Circuit relied upon supports such a distinction; indeed, several of the cases the court cites demonstrate the opposite, that is, that the defendant indeed did something morally culpable, but was unaware of some fact concerning legal status essential to the particular offense with which he was charged. *See, e.g.*, *Reese v. State*, 106 N.M. 498, 745 P.2d 1146 (1987) (defendant not guilty of assaulting a police officer if he believed the victim was an ordinary citizen because the offense required knowledge that the victim was a police officer), cited at Pet. App. 13a-14a. Plainly, a defendant who assaults a police officer believing that he is assaulting an "ordinary citizen" is entitled to a mistake-of-fact defense not because he is "not morally culpable" and not because "his conduct was at all times innocent", but because his mistake as to the legal status of his victim is a mistake of fact material to the crime charged. *See also General v. State*, 367 Md. 475, 789 A.2d 102 (2002) (defendant charged with failing to remain at the scene of an accident resulting in injury or death was entitled to introduce defense that he believed he had struck a white bag and not a person.), cited at Pet. App. 13a. Obviously, a person who leaves the scene of an accident is not wholly innocent; his ability to mount a defense on mens rea grounds is not conditioned on meeting such a test.

The extraordinary and novel notion advanced by the First Circuit in this case that a mistake-of-fact defense may not be raised "once all elements of the crime have been met" begs the question: what crime? The elements of the crime charged, possession of stolen property after March 8, 2002 were met only if the court eliminated two elements: that the property was still "stolen" and that the defendant, who held unchallenged title to it, knew it. That the defendant may or may have not have committed some other uncharged offense is simply irrelevant to whether he had the right to have a jury decide the elements of the offense with which he was charged. The issue whether the 1999 transfer altered the legal status of the paintings and the defendant's belief about their legal status is not affected by conduct prior to that transfer and the defendant should not have been deprived of his only meaningful defenses on the basis of such conduct.

Finally, the First Circuit advanced a policy rationale for its ruling: that a defendant might try to contract his way out of an offense and then raise mistake-of-fact as a defense. This fear is unfounded. Had the government sought to file charges with respect to the pre-transfer period of possession, the 1999 transfer would have posed no impediment. Such a charge could have been brought up to five years after the transfer. 18 U.S.C. § 3282(a). It was not. The First Circuit's ruling endorsing an instruction to the jury to ignore the effect of the transfer of title in 1999 on the defendant's subjective belief effectively permits the prosecution to avoid the statute of limitations.

III. The First Circuit's Interpretation of the Credit-against-Loss Provision in §2B1.1 Conflicts with its Plain Language and Undermines the Policy Favoring Voluntary Restitution.

The defendant's sentence was driven by a loss calculation that included the astronomical value of the painting he returned years before his offense and identity were discovered. The court's interpretation of the commentary to U.S.S.G. §2B1.1 applicable to credits to be applied against the loss calculation defies the plain language and meaning of the guideline commentary. Because the decision is unmoored to the language or policy rationale for the credit, it presents an important question of law that this Court should resolve.

Pursuant to application note 3(E) to §2B1.1, the loss in this case should have been reduced by the value of the Cézanne because Mardirosian returned it before anyone knew his identity or that he had committed any offense. In 1999 when Mardirosian returned the Cézanne, neither Bakwin nor law enforcement knew either Mardirosian's identity nor the circumstances under which the then-current holder had come into possession.

The First Circuit's ruling that the offense was discovered in 1978 when Bakwin learned that his paintings were stolen (*see* Pet. App. 21a) is clearly erroneous. The "offense" at issue is not the theft of the paintings, with which the defendant was not involved, but the possession of the paintings, with knowledge that they had been stolen, after they had been transported across a state or national boundary. That offense did not even occur until in or about 1988, and

was not discovered until well after the return of the Cézanne, that is, when both the identity of the possessor and the circumstances under which he came into possession of the paintings became known. That was January 2006, at the earliest. Under the First Circuit's reading of the application note, the possibility of a credit against loss evaporated even before Mardirosian came into possession of the paintings.

The First Circuit's interpretation of application note 3(E) to eliminate the availability of a credit against loss unless the property is returned before the victim is even aware of the theft not only plainly misreads the rule, it is irrational and serves no conceivable policy interest. The clear policy underlying the credit is to encourage defendants to make voluntary restitution before it serves their penal interests to do so. Closing the credit-against-loss window before Mardirosian even came into possession both runs counter to that policy and is an irrational interpretation of the guideline.

Crediting the value of the painting Mardirosian returned voluntarily was not only required by the Guideline, but, contrary to the First Circuit's opinion, works no injustice. The fact is that he returned property worth $29.3 million in exchange for title to property worth less than $1 million at a time when no one was close to discovering his identity or the whereabouts of the paintings. He did so before he was under any compulsion to do so and before it served his penal interests to do so. That he did so after Bakwin knew of the original theft is of no moment because Mardirosian had no role in the theft.

Finally, the court's interpretation favors white-collar embezzlers, who contrive to conceal their defalcation, over street criminals who rob banks or commit larceny from the person, who may succeed in hiding their identity but not the loss. In either case, a voluntary return of property before the offender is identified should effect the same credit against loss.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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JULY 2010